No. 98-69

In The

Supreme Court of the United States

October Term, 1997

SAL TINNERELLO & SONS, INC.,

Petitioner,

vs.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY and DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that the Respondent, the Town of Stonington, may collect solid waste as a municipal function and prohibit others both local and non-local from doing so without violating the Commerce Clause?

2. Did the Court of Appeals correctly conclude that the Town of Stonington may contract as a market participant for collection and disposal of solid waste?

3. Did the Court of Appeals correctly conclude that the action of the Town of Stonington in taking over collection and disposal of solid waste as a municipal function did not violate the Contract Clause?

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STATEMENT OF JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

STATEMENT OF THE CASE

This action is an interlocutory appeal arising from denial of the Petitioner's request for a preliminary injunction by the District Court for the District of Connecticut. The Court of Appeals for the Second Circuit affirmed the lower court ruling. *Sal Tinnerello and Sons, Inc. v. Town of Stonington*, 141 F.3d 46 (2d Cir. 1998); Petition for Writ of Certiorari With Appendix (hereinafter "Petition"), A-1 through A-23.

In 1973, the Connecticut General Assembly created the Connecticut Resources Recovery Authority, a quasi-public agency, (hereinafter "CRRA") to develop incinerator facilities as an alternative to landfills. *Petition*, A-3. Six incinerators were constructed at various locations in the State of Connecticut pursuant to the State Solid Waste Management Plan. *Id.* The Respondent, Town of Stonington, along with thirteen other towns in Southeastern Connecticut, are members of the Southeastern Connecticut Regional Resources Recovery Authority (hereinafter "SCRRRA"), a quasi-public agency which constructed the incinerator located in Preston, Connecticut. *Id.*

The incinerator was constructed with funds derived from the sale of bonds issued by CRRA. *Id.* at A-4. Both the Court of Appeals and District Court found that the Town, consistent with the State of Connecticut's solid waste management plan, undertook to participate in the construction of the Preston incinerator in order to provide a safe and efficient means of solid waste disposal for solid waste generated within the Town. *Id.* at A-4, A-27. In November, 1985, the Town entered into a

contract with SCRRRA. *Id.* at A-4. All member municipalities entered into similar contracts. *Id.* The Town's contract with SCRRRA requires the Town to deliver an annual minimum commitment of solid waste to the incinerator or pay an amount equal to the cost of disposing of that portion of the minimum commitment which is not delivered. *Id.* The purpose of the minimum commitment is to guarantee sufficient funds to run the incinerator and pay for the bonds which financed its construction. *Id.* The full faith and credit of the Town backs the commitment. *Id.*

In order to ensure that the Town's garbage went to the Preston incinerator, the Town adopted a flow control ordinance which required all waste haulers collecting within the Town to use the Preston facility. *Id.* at A-5. The garbage delivered and dollars paid were applied against the Town's minimum commitment. *Id.*

In 1994, this Court ruled that flow control ordinances were unconstitutional in violation of the Commerce Clause. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (hereinafter "Carbone"). In December, 1995, the District Court for the District of Connecticut ruled that a slightly different flow control ordinance adopted by the Town of East Lyme, Connecticut, another member of SCRRRA, also was unconstitutional. *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995). Plaintiff was a party in that action. *Petition*, A-5.

Thereafter, the volume of Stonington waste delivered to Preston dropped substantially. *Id.* Private haulers avoided the Preston facility and disposed of their waste at other places, including transfer stations in Rhode Island, at rates less than those necessary to finance and operate the Preston incinerator. *Id.* at A-5, A-6. By March, 1997, virtually none of the Town's commercial waste was going to the Preston incinerator. *Id.* at A-6.

In early December, 1996, the Town began to study the possibility of the Town taking over the function of commercial collection and disposal of solid waste. Town officials believed that unless something were done the Town would lose all of its commercial waste to disposal sites other than Preston. *Id.* The Town therefore considered three alternatives: (a) do nothing and fund the shortfall in the minimum commitment through a tax increase of approximately $500,000; (b) lower the tip fee paid by commercial haulers to equal the spot market price by subsidizing the Preston fee through the use of tax revenues; and (c) assume control over waste collection by either hiring municipal employees and purchasing equipment or using the contractual arrangement ultimately adopted. *Id.* at A-6, A-7. The Town based consideration of the latter alternative on *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996) (hereinafter "Babylon"), and *SSC Corp v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) (hereinafter "Smithtown"), in which the Second Circuit upheld the constitutionality of two long Island towns' takeover of municipal garbage collection against commerce clause challenges. *Id.* at A-8, A-9.

Ultimately, the Town rejected the no action alternative since it did not meet any of the Town's objectives. It would result in a one half mil tax increase to the taxpayers, assuming that the amount of commercial solid waste delivered to the Preston incinerator stayed at the reduced levels seen in early 1997. *Id.* at A-7. Further, it provided the Town no control over the waste disposal site, and would shift much of the cost of meeting the Town's minimum commitment to the generators of residential waste, who were paying for the cost of collection and disposal of their waste through the purchase of Town garbage bags. *Id.*

From April through June, 1997, the Town subsidized the difference between the tip fee charged at the Preston incinerator,

and the spot market price of $57.50 a ton. *Id.* Even assuming no change in the Preston fee or the spot market price, the subsidy program would cost the Town's taxpayers about $260,000 in fiscal year 1998 and require a .26 mil increase. *Id.* at A-8.

Town officials therefore concluded that the Town should assume the function of collecting municipal waste using private haulers, because it would allow the Town to control the disposition of solid waste without a tax increase, would dispose of the waste at a fully permitted and properly operated facility, and would provide an equitable volume-based user fee for all generators of solid waste. *Id.* at A-7.

On April 10, 1997, the Board of Selectmen of the town voted unanimously to convene a Town meeting to act on a proposed ordinance, which would allow the Town to takeover garbage collection. *Id.* at A-8. The ordinance was adopted at a Town meeting on April 21, 1997. *Id.*

The ordinance created the Stonington Resource Recovery Authority (the "Authority"), and designated the Town's Board of Selectmen as the Authority as permitted by Conn. Gen. Stat. § 7-273aa(b) (1997). *Id.* at A-9. The ordinance provided that, effective July 1, 1997, the Authority or collectors with whom the Authority had contracted would remove, transport and dispose of solid waste. *Id.* It prohibited others from removing, transporting or disposing of solid waste. *Id.*

The Town thereafter widely publicized requests for proposals seeking bids from private waste haulers. *Id.* The Town was interested in preserving competition by providing, to the extent practicable, an opportunity for existing haulers to continue to provide service in the Town. *Id.* The Town therefore considered factors other than price, including

preservation of competition. *Id.* In fact, the first selection criterion in the RFP was experience identical to or related to that required under the procurement. *Id.* The Town expected that existing haulers, including Plaintiff, would submit proposals, and that more than one of them would continue to provide service to the Town. *Id.*

Plaintiff chose not to bid because it believed the ordinance was illegal. *Id.* Three other haulers submitted bids. The Authority entered into several contracts with one of them, USA Waste of Connecticut. *Id.*

On the effective date of the ordinance, Plaintiff had approximately 70 customers in the Town, roughly half of which had written contracts. *Id.* Three quarters of the written contracts provide for an initial term of one year with automatic renewals. *Id.* The remainder of the written contracts provide for an initial term of two or more years. *Id.* In June, 1997, the Plaintiff's total revenue from commercial accounts in the Town was approximately $18,000, representing on an annual basis seven percent of its business. *Id.*

On June 20, 1997, Plaintiff commenced this action seeking a temporary and permanent injunction preventing the Town from enforcing the ordinance. *Id.* The District Court denied preliminary injunctive relief because Plaintiff had failed to establish either a likelihood of success on the merits or irreparable harm. *Petition*, A-35, A-36. The Court of Appeals did not reach the issue of irreparable harm because it concluded that petitioner had not established a likelihood of success on the merits. *Petition*, A-22.

REASONS FOR DENYING THE WRIT

There is no inconsistency between this Court's holding in *Carbone*, and the Second Circuit holdings in the case at bar

and in *Smithtown*, and *Babylon*. The opinion below properly concludes that the Town of Stonington, in creating garbage districts, exercised traditional municipal police power consistent with holdings of this Court regarding the dormant aspect of the Commerce Clause and the market participant doctrine. U.S. Const. art. I, § 8. Moreover, the Court correctly concluded that the action of the Town of Stonington did not violate the Contract Clause. U.S. Const. art. I, § 10.

I.

THE SECOND CIRCUIT DID NOT DEPART FROM CONTROLLING PRECEDENTS AND CORRECTLY APPLIED COMMERCE CLAUSE PRINCIPLES IN THE INSTANT ACTION.

A. Collection and Disposal of Solid Waste Involve a Core Governmental Function.

The Petitioner's blithe suggestion that the Town's actions amounted to legislating a monopoly does little to further constitutional analysis. It has long been recognized that collection and disposal of solid waste is a core governmental function. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), this Court upheld the authority of local governments to establish municipal collection and disposal systems and exclude private interests. Rejecting a due process challenge to San Francisco's collection ordinance, the Court noted:

> [I]t is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.

199 U.S. at 319. In *Gardner v. Michigan*, 199 U.S. 325 (1905), this Court rejected a takings claim with respect to Detroit's exclusive collection and disposal service.

The present action is the third Second Circuit case recognizing the fundamental right of municipalities to perform collection and disposal of solid waste as a governmental function. In *Babylon*, the Court noted:

> For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States. At their option, cities may provide garbage pick-up to their citizens directly (that is, through town employees or an independent contractor), or they may rely on a closely regulated private market to provide those services.

Babylon, 66 F.3d at 1275. In the Resource Conservation and Recovery Act, Congress specifically provides that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies. . . ." 42 U.S.C. § 6901(a)(4) (1995).

States have long recognized that garbage collection and disposal is a core government function. Connecticut law provides that municipalities have the power to: "Provide for or regulate the collection and disposal of garbage, trash, rubbish, waste material and ashes by contract or otherwise, . . ." Conn. Gen. Stat. § 7-148(c)(4)(H) (1997). *See also* Mass. Gen. L. ch. 41, § 69D (1998) (Board of Public Works shall have powers regarding collection and disposal of garbage and refuse); Cal. Gov't Code § 25827 (West 1993) (Board of Supervisors of each county may collect or contract for collection, or both, of garbage, waste, refuse, rubbish). Me.

Rev. Stat. Ann. tit. 38, § 1702 (West 1998); Ill. Rev. Stat. ch. 55, para. 5/5 - 15010, para. 5/5 - 1048 (1993); Tex. Health & Safety Code Ann. § 364.034 (West 1996).

Petitioner's contention that the Second Circuit has misapplied *Carbone* is without merit. In *Carbone*, this Court invalidated a Clarkstown, New York, flow control ordinance which required under threat of penalty that all private haulers deposit their solid waste at a single transfer station designated in the ordinance. This Court held that the ordinance discriminated against interstate commerce by driving up the cost of disposing of out-of-state waste since it had to be handled twice at the plaintiff's and the town's transfer stations and by excluding from the disposal market all except one legally designated local service provider. *Carbone*, 511 U.S. at 389-390. As a result of its discriminatory impact on interstate commerce, the ordinance was subjected to rigorous scrutiny and determined unconstitutional. *Id.* at 392.

The Second Circuit has consistently followed *Carbone*, not only in this matter, but also in *Smithtown* and *Babylon*. The Towns of Stonington, Smithtown and Babylon at one time all had flow control ordinances requiring private haulers of garbage to deliver their solid waste to a designated facility under threat of criminal penalty. In *Smithtown*, the court considered the validity of the Smithtown flow control ordinance. In ruling the Smithtown flow control ordinance invalid, the court concluded:

> Carbone compels us to find that Smithtown's flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors. Accordingly, Smithtown must

> "demonstrate, under rigorous scrutiny that it has no other means [than its flow control ordinance] to advance a legitimate local interest." *Id.* at __, 114 S. Ct. at 1683.

Smithtown, 66 F.3d at 514.

In *Babylon*, and the present action, the outdated and unconstitutional flow control ordinances were not before the court. Rather than legislating disposal at a specific site, both municipalities here provided by ordinance for a municipal takeover of solid waste collection, by prohibiting anyone except the town or its agents from hauling solid waste within the respective towns. In fact, the court below found:

> Stonington's waste management plan, which is comprised of the ordinance and contracts between the Town and one or more waste-hauling companies, was modeled after: (1) an ordinance and a government contract that were a part of the waste management plan of the Town of Babylon, New York; and (2) a government contract for waste-hauling services entered into by the Town of Smithtown in New York, all of which we have previously held not violative of the Commerce Clause.

Petition, A-8, A-9 (citations omitted).

Stonington's ordinance does not require disposal at any particular site or discriminate against interstate commerce. It prohibits all firms, local and national, from collecting waste within the Town. The court below correctly analyzed the ordinance's impact on commerce. When the Petitioner argues that "[t]he Court below improperly failed to apply heightened

scrutiny to an ordinance which requires disposal at a designated in-state facility," it completely misstates the provisions of the ordinance. *Petition*, at p. 17. The Stonington ordinance simply allows the Town to take over the function of collecting solid waste. Unlike the ordinances in *Carbone* and *Smithtown*, it does not designate a site or require private haulers to take their waste there and thereby discriminate against interstate commerce. The Stonington ordinance eliminates the private collection and disposal markets. It treats both local and non-local firms in exactly the same way.

B. The Town Was a Market Participant Purchasing Collection and Disposal Services.

The court below correctly held that Stonington was a market participant when it purchased collection and disposal services for solid waste. *Petition*, A-20, A-21. Having determined to exercise its authority to collect garbage, Stonington could do so either with municipal employees or by contract. In purchasing the services by contract, Stonington acted as a market participant. Again, the court followed settled precedent in analyzing Stonington's contract.

In *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983), the City of Boston required all city funded construction contracts to be performed by a work force of at least fifty percent Boston residents. This Court held that the City was a market participant and everyone affected by the provision was "in a substantial if informal sense 'working for the city'." 460 U.S. at 211 n.7. Boston was participating in the market as a purchaser of construction services and free to favor its own citizens. In the present action, the Town of Stonington was similarly a market participant. *See also Smithtown*, 66 F.3d at 510-512; *Babylon*, 66 F.3d at 1288-1291. When a municipality is purchasing services for public

buildings, public roads, street lighting, police vehicles, garbage trucks or garbage collection or disposal services, it is acting as a market participant — free from Commerce Clause scrutiny. Moreover, the Town of Stonington did not discriminate against interstate commerce in its selection of a garbage hauler. The court below specifically noted:

> Moreover, the Town has not favored in-state haulers over out-of-state competitors. It sought bids from local firms as well as those operating around the nation by placing requests for proposals in local newspapers as well as national trade publications. In fact, the contractor that secured the contract, USA, is a national company rather than a local one.

Petition, at A-22.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Petitioner's argument that there exists a conflict between the Second, Third and Eleventh Circuits is erroneous. The most recent case from the Third Circuit, *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 112 F.3d 652 (3d Cir.), *cert. denied*, 118 S. Ct. 412, 413 (1997), dealt with a flow control provision not market participation. By regulation, New Jersey designated specific disposal sites to which all solid waste was required to be delivered. *Atlantic Coast*, 112 F.3d at 658. The Third Circuit applying *Carbone* found that the New Jersey flow control regulations discriminated against interstate commerce. Applying the rigorous scrutiny test, the court determined that the state regulation violated the dormant aspect of the Commerce Clause. *Id.* at 667.

The Eleventh Circuit case merely affirmed without opinion a pre *Carbone* District Court decision dealing with flow control ordinances. *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without opinion*, 29 F.3d 641 (11th Cir. 1994). The District Court opinion is consistent with *Carbone*. In *Smithtown*, the Second Circuit rejected the *Waste Recycling* court's reasoning that a town must be motivated by profit making concerns or possess a proprietary interest in the garbage in order to be a market participant. *Smithtown*, 66 F.3d at 516. The District Court in *Waste Recycling* specifically noted that it was not dealing with a municipal takeover of solid waste collection and disposal. *Waste Recycling*, 814 F. Supp. at 1583 n. 22. The Second Circuit would have reached the same result in *Atlantic Coast*, and *Waste Recycling*.

Where faced with a flow control ordinance, the Second Circuit has applied rigorous scrutiny and held it unconstitutional consistent with *Carbone*. *See Smithtown*, 66 F.3d 502. The present action, unlike *Atlantic Coast*, *Waste Recycling*, and *Smithtown*, simply does not involve a flow control regulation. The Town of Stonington took over the collection and disposal of garbage as a municipal function joining cities and towns all over the country. Petitioner's reading of *Carbone* would lead to the conclusion that exclusive municipal garbage collection system is per se unconstitutional. Such a broad reading of *Carbone* finds no historical support.

Significantly, this Court had denied certiorari in *Atlantic Coast*, *Smithtown* and *Babylon*.

III.

THE TOWN OF STONINGTON'S ORDINANCE AND ITS CONTRACT WITH USA DID NOT VIOLATE THE CONTRACT CLAUSE.

The Court of Appeals correctly applied a three part test consistent with this Court's direction to determine whether the Stonington ordinance violated the Contract Clause. *Petition*, A-13. The court noted:

> Following the direction of the Supreme Court, we have held that claims brought under the Contract Clause require consideration of three factors: (1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate.

Id. A-13 through A-14. The court concluded that the town's "goals of safety, efficiency and equity in designing and implementing a waste management system are wholly legitimate." *Petition*, A-16. The court also held that the means chosen to achieve those purposes were reasonable and necessary. *Petition*, A-18.

Significantly, Petitioner does not even discuss the standard set forth by the Court of Appeals. Moreover, the Petitioner seeks to retry the facts of the case here. The Petitioner's attempt to characterize the Town's contract with SCRRA as a "bad deal" was specifically rejected by the Court of Appeals. *Petition*, A-18. Merely because the fee at Preston is higher does not

mean it is a bad deal. Likewise, the Petitioner's contention that the Town was motivated solely by fiscal concerns was specifically rejected by both lower courts. The District Court stated that "the ordinance serves significant public purposes by providing for safe and efficient collection and disposal of solid waste on an equitable user-fee basis." *Petition*, A-35.

Similarly, the Court of Appeals rejected the Petitioner's contention. The court held:

> We consider that Stonington's stated goals of safety, efficiency and equity in designing and implementing a waste management system are wholly legitimate. Although the Town's initial enactment of a flow control ordinance in order to provide a safe and efficient disposal operation may have been a constitutionally infirm means, the objective of safe and efficient waste disposal undoubtedly is a legitimate public goal. Imposing the costs of solid waste disposal on an equitable, user-fee basis rather than utilizing general tax revenue is also a legitimate public goal. . . . Tinerello further contends that "[t]he facts simply do not support a finding that the purpose of the ordinance related to safety, efficiency or equity. Rather, . . . the sole purpose of the ordinance was to impermissibly direct waste and revenue to a favored facility." We reject this contention. The ordinance challenged in the instant case clearly was enacted in furtherance of the Town's safety, efficiency and equity concerns.

Petition, A-16, A-17. In short, Petitioner would require heightened scrutiny where a state acts in the general economic interest of its citizens as opposed to impacting its own contracts.

This standard finds no support, and in any event the lower courts found that the Town was not solely motivated by economic reasons.

The Plaintiff's reliance on *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, *reh'g denied*, 431 U.S. 975 (1977), is misplaced. In *United States Trust Co.*, this Court held that when a state impairs the obligation of its own undertaking, Contract Clause analysis stands on a completely different footing. 431 U.S. at 22-23. *See also Condell v. Bress*, 983 F.2d 415 (2d Cir.), *cert. denied*, 507 U.S. 1032 (1993); and *Association of Surrogates and Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992), (applying *United States Trust* to the state's own contracts). Similarly, Plaintiff's reliance on *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) is misplaced. In *Spannaus*, this Court held that the law in question was "not even purportedly enacted to deal with a broad generalized economic or social problem." 430 U.S. at 250. *See also Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412, n. 13 (1983) (suggesting that the Minnesota pension law in *Spannaus* "may have been directed at one particular employer planning to terminate its pension plan when its collective bargaining agreement expires").

Even though the public purposes served by Stonington are much broader than mere economics, as found by the District Court and affirmed by the Court of Appeals, this Court also has indicated that the economic interest of the state alone may be sufficient to provide the necessary public purpose for Contract Clause analysis. *City of El Paso v. Simmons*, 379 U.S. 497 (1965). The Court held that the "economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

379 U.S. at 508 (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934)). The decision below involves straightforward application of settled law to factual findings which are not clearly erroneous.

CONCLUSION

This Court should deny the writ as to all issues raised in the petition.

Respectfully submitted,

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